MUHAMMAD ABDULLAH & ORS.

v.

FU LEE DEVELOPMENT SDN. BHD., AZIZ & CO. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. F 37 OF 1983]
21 MAY 1988

CIVIL PROCEDURE: *Retention Sums held by garnishee as stakeholder - Assignment of retention sums by judgment debtor to intervener - Retention sums payable only on issue of certificate of fitness - Certificate of fitness not issued yet - Whether debt due or accruing to judgment debtor from garnishee - Order 49 r. 1(1) RHC 1980.*

The judgment creditors purchased units in the judgment debtors housing project which was completed in 1982. The sale and purchase agreement between them stated that the final instalment of the purchase price amounting to 5% of the purchase price was to be retained by the garnishee as stakeholder until the issuance of the certificate of fitness whereupon it was to be released to the judgment debtor. No certificate of fitness had been issued in respect of the units.

By an exchange of letters between the judgment debtor and the intervener with notice to the garnishee, it confirmed an assignment of the retention sum from the judgment debtor to the intervener and the garnishee as stakeholder gave its undertaking to remit these sums to the intervener upon issuance of the certificate of fitness. The assignment occurred 2 years before the judgment creditors obtained their judgment against the judgment debtors. The Senior Assistant Registrar ordered that the retention monies held by the garnishee remain garnished until further enquiry to satisfy a debt against the judgment debtor by the judgment creditors.

The intervener appealed against this decision and sought *inter alia,* the determination of the Court as to the question of whether there was a debt due or accruing to the judgment debtor from the garnishee under O. 49 r. 1(1) RHC 1980.

Held:

That the monies which were in the hands of the garnishee cannot constitute a debt due or accruing to the judgment debtor within the meaning and scope of O. 49 r. 1(1) RHC 1980 until the fulfillment of the contingency, that is until the certificate of fitness is issued.

[Accordingly the appeal is allowed with costs.]

Cases referred to:

Dunlop & Ranken, Ltd v. Hendall Steel Structures, Ltd., (Pitchers Ltd., Garnishees) [1957] 3 All ER 341

Hong Kong and Shanghai Banking Corporation v. Goh Su Liat (Telecommunications Authority of Singapore, Garnishee) [1986] 2 MLJ 86

Legislation referred to:

Rules of the High Court 1980, O. 49 r. 1(1)

For the judgment creditors - R.D. Rajasingam; M/s. Lewis & Co.
For the judgment debtor - N.V. Kumar; M/s. Albar Zulkifly & Yap
For the intervener - S. Fernandez (Pawan Chik bin Marican with him); M/s. Wan Marican & Hamzah
For the garnishee - Y.L. Ng; M/s. Aziz & Co.

JUDGMENT

LC Vohrah J:

This is an appeal by the intervener against the decision of the learned Senior Assistant Registrar ordering that certain monies held by the garnishee as stakeholder remain garnished until further inquiry to satisfy a judgment recovered against the judgment debtor by the judgment creditors.

The facts of the case insofar as they are relevant to this appeal are as follows. The intervener as the financier for a housing project developed by the judgment debtor provided two types of loan - known in commercial parlance as "bridging loan" and "end-financing", the former to the judgment debtor and the latter to the individual purchasers of the units in the housing project. The sums available by way of end-financing were released progressively to the judgment debtor by the intervener on the basis of certificates of completion issued by the architect for the housing project. All payments made by way of end-financing were channelled to the judgment debtor through the garnishee. It is stipulated in the sale and purchase agreement between the judgment debtor and the purchaser that the final instalment amounting to 5% of the purchase price is to be retained by the garnishee as stakeholder until the issuance of the certificate of fitness. The judgment creditors' units were completed in 1982 but certificates of fitness have still not been issued by the authorities in respect of these units. By an exchange of letter in 1983 (See Exhibits WAZ9 & WAZ10, encl. 40), the judgment debtor and the intervener with notice to the garnishee confirmed what purported to be an assignment whereby all the monies comprising the final 5% instalment payments of the purchase price which had been forwarded to the garnishee were to be held by the garnishee as stakeholder on its undertaking as a firm of solicitors to remit these sums back to the intervener upon issuance of the relevant certificates of fitness towards reduction of the judgment debtor's account with the intervener. This assignment was effected 2 years before the judgment creditors obtained their judgment against this judgment debtor.

The sole issue for determination in this appeal is whether there is a debt due or accruing due to the judgment debtor from the garnishee within the meaning and scope of O. 49 r. 1(1) of the Rules of the High Court 1980 which reads:

> Where a person (in this Order referred to as "the judgment creditor") has obtained a judgment or order for the payment by some other person (in this order referred to as "the judgment debtor") of money, not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (in this Order referred to as "the garnishee") is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings. (emphasis provided)

The main ground of appeal relied upon by Counsel for the intervener is that because the monies comprising the final 5% instalment payments become payable to the judgment debtor upon some contingency, namely the issuance of the certificate of fitness, these monies are not attachable as they do not constitute a debt due or accruing due to the judgment debtor. In support of the contention he referred to two authorities. *Dunlop & Rankan, Ltd. v. Hendall Steel Structures, Ltd.* (Pitchers, Ltd., Garnishees) [1957] 3 All ER 344. and *Hongkong and Shanghai Banking Corporation v. Goh Su Liat* (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86. In the former case, according to the headnote judgment creditors of sub-contractors, nominated under cl. 2 of the conditions of a building contract in the RIBA form obtained a garnishee order against the principal contractors under the building

contract. Under clause 21 of the contract no payment was due to a sub-contractor until receipt of the architect's certificate under clause 24. The order for steel work given by the principal contractors to the sub-contractors included a condition that payment was to be made "in accordance with the certificates and the times provided in the" building contract. When the garnishee order was made one final certificate had not been issued by the architect and under it, when issued, some payment to the sub-contractors would be directed. On appeal against the garnishee order, it was held that until the architect's certificate had been given there was no debt due to the sub-contractors and as the certificate had not been given when the garnishee order was made, the order should not have been made and accordingly the appeal was allowed. In the latter case, the judgment debtor was employed as a Senior Operator-In-Charge with the Telecommunication Authority of Singapore (the garnishee). In June 1985, the judgment creditor commenced an action against the judgment debtor for the sum of RM14,102.88 and interest being the sum due on the judgment debtor's master card and visa card accounts with the judgment creditor. Judgment in default of appearance was entered against the judgment debtor for the sum claimed, interest and costs on 29 July 1985. The judgment creditor applied *ex parte* by summons for and obtained on 6 September 1985, a garnishee order to show cause calling upon the garnishee to show cause and the garnishee was required to attend before the Assistant Registrar on 27 September 1985. On 4 October 1985. the hearing day, only the judgment creditor appeared whereupon the Assistant Registrar made a garnishee order absolute against the garnishee ordering the garnishee to pay forthwith to the judgment creditor the sum of RM967.70 being the judgment debtor's net salary for the month. The judgment debtor appealed against the orders of the Assistant Registrar given on 6 September 1985 and 4 October 1985. In allowing the appeal of the judgment debtor Chua J had this to say (at p. 87):

> There is no dispute that the judgment debtor's October salary was not due until 31 October 1985. So at the date of the garnishee order absolute, 4 October 1985, there was no attachable debt. Even an existing right under which something is accrued which will probably become a debt at some future date is not sufficient notwithstanding that the amount to become due is capable of being calculated with precision (17 *Halsbury's* para. 527).

In my view to arrive at a proper determination of the issue that has been posed, consideration must be given to the relevant provisions of the sale and purchase agreement appearing in the First Schedule relating to the final 5% instalment payment which read:

> a sum equivalent to 5% of the purchase price which shall be paid to the vendor's solicitors ... as stakeholder for payment to the vendor on production of the certificate of fitness for occupation if any to the said building. (emphasis provided).

It is not in dispute that a certificate of fitness is required and that it has not been issued. On the authority of the two cases which have been cited, *supra*, I am of the view that the monies in the hands of the intervener cannot constitute a debt due or accruing due to the judgment debtor until the fulfilment of the contingency, that is until the certificate of fitness is produced.

Counsel for the judgment creditors has submitted that because the monies that are in the hands of the garnishee have been released to the garnishee on the basis of certificates of completion issued by the architect the judgment creditors thereby "are obliged to pay" the judgment debtor and that accordingly their debt to the judgment debtor has accrued but that payment thereof has been stayed until the production of the certificate of fitness, I do not agree. The judgment creditors are bound by the terms of the sale and purchase agreement and the language of the relevant provisions, *supra*, clearly indicate that the judgment debtor

is entitled to payment of the monies only upon production of the certificate of fitness and until this condition is met. I cannot see how the monies can be said to be due or accruing due to the judgment debtor.

In view of my finding on the main ground of the intervener's appeal I do not consider it necessary to deal with the other subsidiary grounds that were relied upon by Counsel for the intervener. In the result this appeal is allowed with costs.

Also found at [1988] 2 CLJ 469